United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7369

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIA RIVERA MENDEZ, individually and on behalf of all other persons similarly situated,

Plaintiff,

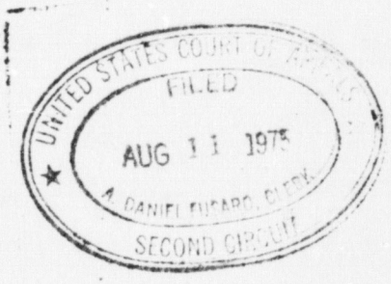
LOUISA ROMAN, individually and on behalf of all other persons similarly situated,

Intervenor-Plaintiff-Appellant,

-against-

HON. LOUIS B. HELLER, individually and as Presiding Justice of Special Term, Part V, of the Supreme Court of the State of New York, Kings County, NAT LIEBOWITZ, individually and as Chief Clerk of Special Term, Part V, of the Supreme Court of the State of New York, Kings County, both individually and on behalf of all other persons similarly situated, and LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York,

Defendants-Appellees.



AND APPENDIX
BRIEF FOR PLAINTIFF-APPELLANT

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PREFACE

This is an appeal from an order and judgment of a three-judge court of the United States District Court for the Eastern District of New York composed of Circuit Judge William H. Mulligan, and District Judges John F. Dooling, Jr., and Thomas C. Platt, entered April 15, 1975. The decision is reported at 380 F. Supp. 985 (E.D. N.Y. 1974).

STATEMENT OF THE ISSUES

1. Did the district court err in holding that no case or controversy is presented under Article III of the Constitution when a recent domiciliary of New York challenges the constitutionality of a dura[illegible]esidence requirement for a divorce action, which she alleges is continuously enforced by defendants, but which she has not first challenged in state court?

2. Did the district court err in holding that New York's two-year residence requirement for divorce does not infringe on constitutional rights of recent New York domiciliaries to equal protection and due process of law and to travel?

3. Did the district court err in holding that this action should not be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure?

STATEMENT OF THE CASE

Plaintiff Maria Rivera Mendez brought this action as a class action challenging the constitutionality of the two-year durational residence requirement in New York Domestic Relations Law ("N.Y.D.R.L.") §230(5). That subsection establishes a general two-year residence requirement as a jurisdictional prerequisite for bringing a matrimonial action in New York State courts. The other four subsections of N.Y.D.R.L. §230 provide for various shorter residence requirements in situations not applicable to the facts of the instant case. The two-year durational residence requirement in N.Y.D.R.L. § 230 (5) is challenged on the grounds that it conflicts with the rights of the plaintiff and her class to due process and equal protection of the laws, and to travel, all of which are secured by the fourteenth amendment to the United States Constitution.

By notice of motion dated April 10, 1974, plaintiff Mendez moved the single judge assigned to this case in the Eastern District of New York, Judge Dooling, for summary judgment declaring the challenged residence requirement unconstitutional and certification of the case as a class action. (Index on Appeal ["Index"] 2). On June 24, 1974 Judge Dooling requested that a three-judge court be designated to hear and determine the action. (Index 9). A three-judge court was subsequently convened pursuant to 28 U.S.C. §2284 (Index 12).

In a decision and order dated August 8, 1974, the three-judge court dismissed the complaint, with Judge Dooling dissenting in part. (Index 17). In the same decision and order, the three-judge court refused to certify the action as a class action. Thereafter plaintiff Mendez filed a notice of appeal to the Supreme Court of the United States (Index 19) and a jurisdictional statement in the Supreme Court. Defendants moved to dismiss or affirm. By judgment entered February 18, 1975 the Supreme Court vacated the judgment and remanded to the district court so that a new appeal could be taken to this Court. (Index 20).

Subsequently by stipulation approved by the three-judge district court, plaintiff-appellant Louisa Roman intervened as a plaintiff in this action. (Index 21). By judgment dated April 15, 1975 the action was again dismissed. (Index 24).

By stipulation approved by the three-judge court plaintiff-appellant Roman was permitted to proceed on appeal in forma pauperis. (Index 25). On April 15, 1975 plaintiff Roman filed a notice of appeal to this Court. (Index 26).

Further references to "plaintiff" in this brief are intended to indicate intervenor-plaintiff-appellant Roman.

STATEMENT OF FACTS

Plaintiff Louisa Roman is a domiciliary of New York State and Kings County and has been since July, 1974. She intends to remain in New York State indefinitely. Previously she was a resident of Puerto Rico and California. She was born in New York. (Intervenor's Complaint, attached to Stipulation, Index 21, para. 12).

Plaintiff married Thomas A. Roman on March 31, 1973, in Aguadilla, Puerto Rico. Plaintiff Roman and Thomas A. Roman lived together in Puerto Rico and in California as husband and wife until June, 1974. (Intervenor's Complaint, para. 13). Plaintiff Roman has a cause of action for divorce based on Mr. Roman's cruel and inhuman treatment of plaintiff while they lived together in Puerto Rico and California. Plaintiff Roman seeks to bring an action for divorce on this ground. (Intervenor's Complaint, para. 14). Plaintiff Louisa Roman and Thomas A. Roman were not married in New York and have never lived in New York State as husband and wife. The facts constituting plaintiff's cause of action did not occur in New York State. Thus, plaintiff Roman cannot maintain an action for divorce under N.Y.D.R.L. §230(1), (2), (3) and (4). (Intervenor's Complaint, para. 15). Thomas A. Roman has not been a resident of New York State during the past two years. (Intervenor's Complaint, para. 16). Accordingly, under N.Y.D.R.L. §230(5) plaintiff Roman

is barred from maintaining an action for divorce in New York until she has completed two year's continuous residence in New York State.

Each of the defendants enforces N.Y.D.R.L. §230 (5) in his official capactiy as an official of the State of New York. Mendez v. Heller, 380 F. Supp. 985, 988 (E.D.N.Y. 1974). Defendant Louis B. Heller is the Presiding Justice of Special Term, Part V, the matrimonial part, of the Supreme Court of the State of New York, Kings County. As such he is responsible for the administration and operation of the matrimonial part of that Court. (Intervenor's Complaint, para. 7). Defendant Nat Liebowitz is the Chief Clerk of Special Term, Part V, the matrimonial part, of the Supreme Court of the State of New York, Kings County. As such, he is charged with the responsibility of determining whether or not matrimonial actions fulfill statutory procedural requirements so that he may allow them to be placed on the court calendar to be adjudicated. (Intervenor's Complaint, para. 8). Mr. Liebowitz replaced Louis Pearlman in this position in June, 1975. Defendant Louis J. Lefkowitz is Attorney General of the State of New York. As such, he is responsible for the enforcement of the laws of the State of New York and for the defense of their constitutionality. (Intervenor's Complaint, para. 9).

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT THERE WAS NO CASE OR CONTROVERSY BETWEEN THE PARTIES

The district court held that plaintiff's action did not present a "case or controversy" under Article III of the Constitution on the ground that "the essential quality of adverseness is intrinsically absent." Mendez v. Heller, 380 F. Supp. 985, 993 (1974). The court's opinion was based, however, on the particular circumstances of this case: namely that among the defendants enforcing the challenged statute was a state judge who had not previously been asked to rule on the constitutionality of the statute. Because the court below decided the case or controversy issue on such a narrow basis, it may be useful to begin by examining what the court did not hold.

First, the court did not hold that the two-year durational residence requirement in N.Y.D.R.L. §230(5) challenged in this case was inapplicable to plaintiff. There was never any question that it applied to all persons in her circumstances. Mendez v. Heller, supra. Second, the court did not hold that the named defendants had, in the past, done anything other than continuously enforce the challenged statute according to its clear terms. As the district court said in dealing with the class action aspect of this case (see generally Point IV, supra),

> "this is, if properly a case, a classic test case dealing with a matter certain of recurrence and with a statute uninterrupted in its operation." (Emphasis added.)

380 F. Supp. at 996. In fact, defendants initially took the position not only that they were continuously enforcing the law, but also that they were legally bound to do so:

> "These defendants do not have the discretion to extend jurisdiction of the Court to [plaintiff's] suit for divorce and an unenforceable declaration will not free them from the duty of enforcing the law."

Memorandum of Law for Defendants in Opposition to Plaintiff's Motion for Summary Judgment (Index 5), p. 20. Thus, except for the particular circumstance that one of the state officials enforcing the statute is a judge, there is no question that plaintiff was sufficiently threatened with enforcement of the statute to have

> "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . . "

Baker v. Carr, 369 U.S. 156, 204 (1962). See, e.g., Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), in which a pregnant woman and a doctor, respectively, were found to have constitutional standing to seek relief against the continuing enforcement of abortion laws even though the pregnant woman had not actually sought

an illegal abortion and the doctor had not been charged with performing one.

Third, the court did not hold that the case was presented so that no defendant would vigorously defend the constitutionality of N.Y. D.R.L. §230(5). The court found that the legal responsibility of the Attorney General to defend the statute "indeed assures that, if the case can genuinely be maintained, there will be adequate adversary representation of the position that one can suppose the absent husband might wish to take." 380 F. Supp. at 990.

The court did hold that there was no case or controversy because Justice Heller "is not an adversary of the plaintiff, but a judicial officer bound to decide the issue according to the law as he finds it." 380 F. Supp. at 990. The district court's holding is defective in three respects: (a) defendant Heller is sued in his administrative, not just his judicial capacity; (b) the district court's rationale with respect to the defendant judge does not apply to the defendant Clerk and Attorney General; and (c) the result of the holding is that plaintiff will entirely lack a federal forum to protect her constitutional rights in violation of the strong policy of the Civil Rights Act.

A. Defendant Heller Is A Proper Adversary As Administrator Of The Matrimonial Part In Which Plaintiff Must Seek a Divorce

The holding of the district court is based on the assumption that defendant Heller is sued as a judge who would, in the normal course of events in the New York court system, decide the issue plaintiffs are now pressing in federal court. 380 F. Supp. at 990. This assumption is mistaken. Plaintiff sues defendant Heller as the "Presiding Justice"* of the matrimonial part of the Kings County, Supreme Court who is "responsible for the administration and operation of the matrimonial part of that Court in accordance with law." Intervenor's Complaint (Index 21), para. 7. In this role, defendant Heller is the administrative superior of defendant clerk, who directly enforces the residency requirement in N.Y.D.R.L. §230(5) when he rejects for filing complaints which fail to contain allegations of residence satisfying the statute. 380 F. Supp. at 988.

In his administrative capacity defendant Heller is just as much a public administrative official enforcing a state statute as a governor or a welfare commissioner. That plainitff might have sought relief from the residence requirement from Justice Heller in his judicial capacity, but did not, is irrelevant to this case since plaintiff was not bound

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*It is possible that the term "Presiding Justice" was one cause of the district court's misunderstanding. The term refers to the administrative judge of a court or part rather than the judge who happens to be sitting there at any given time. See New York Judiciary Law §§ 216-17.

to exhaust a state judicial remedy. Steffel v. Thompson, 415 U.S. 452, 472-73 (1974); McNeese v. Board of Education, 373 U.S. 668 (1963). In fact, if plaintiff had sought a judicial ruling on the constitutionality of N.Y.D.R.L. §230(5) in Kings County Supreme Court, the motion would not necessarily have come before Justice Heller, who does not sit continuously in the matrimonial part, but before whatever judge happened to be assigned there when the motion came on to be heard.

The district court's misinterpretation of the capacity in which Justice Heller was sued is critical to its holding, which was based on the possibility that Justice Heller, in his judicial capacity, might himself hold the challenged statute unconstitutional.* 380 F. Supp. at 993. It is clear that a judge in his administrative capacity is a proper adversary in a case challenging the constitutionality of a statute or procedure enforced by the administrative personnel of the courts. See, e.g., Conover v. Montemuro, 477 F. 2d 1073, 1082-83 (3d Cir. 1972);

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*Of course, as administrators Justice Heller or the defendant clerk could have refused to apply the challenged statute on the grounds that it is unconstitutional. But such an action would be an administrative ruling not a judicial one. The possibility of such a change in the continuous enforcement of the statute would not mean there is no case or controversy. The defendants in Roe v. Wade, supra, and Doe v. Bolton, supra, for example, could have changed their policy of enforcement of the anti-abortion statutes in a similar manner, but in those cases, as in this one, a practice of continuous administrative enforcement, without any stated change of policy, creates a cognizable threat that the statutes would be enforced against the plaintiffs.

Bramlett v. Peterson, 307 F. Supp. 1311, 1321-22 (M.D. Fla. 1969).

In this respect, Boddie v. Connecticut, 401 U.S. 371 (1971), is virtually identical to this case, There, as here, a court clerk and an administrative judge were sued with respect to the clerk's practice of refusing to file divorce complaints based on a state statute. (In Boddie the statute required the prior payment of a fee). In Boddie, as in this case, plaintiff could have sought relief from the challenged statute in state court. In Boddie, as noted by the district court the plaintiff did seek judicial relief in state court, and since the case came on before a judge other than the administrative judge the separation between the judicial and the administrative functions was starkly clear. Mendez v. Heller, 380 F. Supp at 992; Boddie v. Connecticut, 286 F. Supp. 968, 971-72 (D. Conn. 1968). Although this clarifying element is not present here, the pleadings in this case leave no question that Justice Heller was sued in his administrative capacity and thus is a proper defendant in this case. Complaint of Plaintiff Mendez (Index 1), para. 6; Intervenor's Complaint, para. 7.

That defendant Heller is a proper adversary is also supported by the results of at least three other federal cases challenging durational residence requirements for divorce in which the merits were reached although state judicial relief from the requirement had not been sought. Mon Chi Heung Au v. Lum, 360 F. Supp. 219 (1973); Shiffman v. Askew,

359 F. Supp. 1225 (M.D. Fla. 1973), aff'd sub nom. Makres v. Askew, F. 2d (5th Cir. 1974); McCay v. South Dakota, 366 F. Supp. 1244 (D.S. D. 1973).

B. Even If Justice Heller Lacks An Adversary Interest The Defendant Clerk and Attorney General Do Not

Defendant Liebowitz is the Clerk of the matrimonial part of the court in which plaintiff must seek a divorce. The district court found that as a matter of well established policy and practice

> "the Clerk of the Special Term established for such marital actions examines the complaint to see whether or not the residential allegations are present in it. If they are lacking, then the Clerk rejects the pleading for filing, and in substance advises counsel that the pleading is inadequate and will not be entertained."

380 F. Supp. at 988.

In performing these acts the clerk is in no sense performing a judicial function. His duty, as the court defines it, is to apply the challenged residence requirement until directed not to do so by a court. Such a direction could come either from the court for which he works or from federal court. He is fully as much an adversary of plaintiff as any other public officer who enforces the statutory policy of the state against

individuals, such as a prosecutor or a police chief [Steffel v. Thompson, supra] an attorney general [Doe v. Bolton, supra] or a welfare official [King v. Smith, 392 U.S. 309 (1968)]. Like other officials, defendant Liebowitz has no personal interest adverse to plaintiff's, but his duties as a state officer enforcing a state law place him in direct conflict with plaintiff. Accordingly, the district court's rationale with respect to Justice Heller is irrelevant with respect to Mr. Liebowitz.

Similarly the Attorney General has an interest adverse to plaintiff's. His duty to defend the constitutionality of state statutes is undisputed, 380 F. Supp. at 990. In addition, he has the duty to

> "Prosecute and defend all actions and proceedings in which the state is interested and have charge and control of all the legal business of the departments and bureaus of the state..."

New York Executive Law §63(1). Under these circumstances, the Attorney General has an adequately substantial interest adverse to plaintiff's to justify retaining him as a party. See Doe v. Bolton, 319 F. Supp. 1048, 1051 (N.D. Ga. 1970), aff'd, 410 U.S. 179 (1972), and the cases cited therein.

C. The District Court's Holding Deprives Plaintiff Of Any Access to Federal Court To Protect Her Constitutional Rights In Vidation of the Policy Of the Civil Rights Act

The district court recognized that the effect of its ruling would be to deprive plaintiff entirely of a federal forum for her claim of the unconstitutionality of the two-year residence requirement, 380 F. Supp. at 993. See also Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968), aff'd, 401 U.S. 371 (1971). The only possible approach to obtaining federal jurisdiction other than the one in this case would have been for plaintiff to have filed a divorce action in state court and to have brought a federal action after the dismissal of the divorce action based on failure to comply with the residence requirement. But this alternate route would face insuperable barriers. After plaintiff had begun and lost a state action she would have been barred from federal court by the doctrines of res judicata and comity because she would have bypassed the state appellate process by going into federal court. See Tang v. Appellate Division, 487 F. 2d 138 (2d Cir. 1973).

This issue was potentially presented in Sosna v. Iowa, 419 U.S. 393 (1975), in which the Supreme Court upheld Iowa's one-year divorce residency requirement. In Sosna the plaintiff had gone to

federal court after dismissal of a state court action. Noting probable jurisdiction, the Supreme Court specifically asked the parties to brief the issue of "whether the United States District Court should have proceeded to the merits of the constitutional issue presented in light of Younger v. Harris, 401 U.S. 37 (1971), and related cases." 419 U.S. at 396. Since both parties in Sosna urged that the merits be decided, the Supreme Court did not decide the Younger issue, 419 U.S. at 396-97,n.3, but a subsequent Supreme Court decision applying Younger principles to civil cases leaves little doubt that the Court would have found federal jurisdiction was not properly invoked in Sosna. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

Denying plaintiff access to federal court violates the strong policy of the Civil Rights Act, 42 U.S.C. §1983, to provide a federal remedy for violation of constitutional rights. The Supreme Court stated this policy in Steffel v. Thompson, supra, a case closely analogous to this one but in the criminal area:

> Requiring the federal court totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) —as they are here — we have not required exhaustion of state judicial or administrative remedies,

> recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., NcNeese v. Board of Education, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963); Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.

415 U.S. at 472-73.

The decision of the district court in this case eliminates the "paramount role" of the federal courts in protecting constitutional rights. Although this consideration is perhaps not decisive under Article III, it is an important factor supporting the result plaintiff urges. See Sosna v. Iowa, supra at 401 n. 9. Since the district court itself recognized that in this case "there will be adequate adversary representation," 380 F. Supp. at 990, in defense of the challenged statute, there is no reasonable basis in the language or policy of Article III for denying plaintiff access to federal court.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT N.Y.D.R.L. §230(5) DOES NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAW AND TO TRAVEL

In its recent decision in Sosna v. Iowa, supra, the Supreme Court upheld the constitutionality of Iowa's one-year durational residence requirement for divorce. The Court found that the requirement was justified by the state's substantial interests in not becoming a divorce mill, and in protecting its divorce decrees against collateral attack. 419 U.S. at 406-07. The central question on this appeal is therefore how Sosna affects New York's two-year residence requirement, which imposes greater burdens on the recently arrived persons seeking divorce, and involves a substantially weaker state interest: the alleged need for a two-year instead of a one-year requirement. New York's Domestic Relations Law §230 is particularly arbitrary in that it imposes a one-year residence requirement on most persons seeking a divorce, N.Y.D.R.L. §230(1)-(3), but a two-year requirement on persons in plaintiff's situation. N.Y.D.R.L. §230(5). In his dissent in part below Judge Dooling said

> "the prominence of the one year duration in the statute appears logically to demonstrate that such a provision was adequate to accomplish every legislative objective that duration of residency (as distinguished from the fact of residence) might be supposed to seek to assure."

Mendez v. Heller, supra at 996-97.

As Judge Dooling suggests, the state's interest in having a durational residence requirement is adequately met by a one-year requirement, and New York can assert no constitutional justification for the two-year requirement.

The first question is what standard of the equal protection clause should be applied in examining the constitutionality of the challenged requirement. In its previous durational residence decisions, Shapiro v. Thompson, 394 U.S. 618 (1969), Dunn v. Blumstein, 405 U.S. 330 (1972), and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), the Supreme Court applied the stringent "compelling interest" test of equal protection. In Sosna the Court did not say what test it was applying, but cited Kahn v. Shevin, 416 U.S. 351 (1974), a case employing the "new" one-tier approach to equal protection which requires that classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objective of the legislation." Reed v. Reed, 404 U.S. 71, 76 (1971), quoting Royster Guano Co. v.

Virginia, 253 U.S. 412, 415 (1920).

Since Sosna leaves open which standard is appropriate even for a one-year requirement, the "compelling interest" standard should be applied in this case under the Supreme Court's previous durational residence decisions and the decisions of other courts examining the constitutionality of two-year requirements in other states. Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971); Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973); Fiorentino v. Fiorentino, 310 N.E. 2nd 112 (Mass. 1974). The two-year residence requirement has a clear tendency to deter migration: people who need divorces might well decide not to move if they could not get one for two years after arrival in a new state. See Memorial Hospital v. Maricopa County, supra at 257. The requirement impinges upon other fundamental constitutional rights. Boddie v. Connecticut, supra, establishes that the right to access to the courts to obtain a divorce is fundamental, because of the special position of marriage and family relationships under the Constitution. Thus, the "compelling interest" standard should be applied.

But whatever standard is applied, New York's two-year residence requirement is unconstitutional because it lacks "a fair and substantial relation to the objective of the legislation." Reed v. Reed,

supra at 76. Both the state interests which the Supreme Court found to justify the one-year requirement in Sosna, avoidance of becoming a divorce mill and protection of divorce decrees against collateral attack, could be adequately served by the significantly less burdensome requirement of one-year's residence.

If New York were limited to a one-year durational residency for divorce it would still receive more than ample protection from becoming a divorce mill. There is no rational basis for suggesting that unhappy spouses would migrate to New York in order to obtain divorces when they would have to wait at least a year to obtain one in New York while they presumably could obtain one almost immediately in the state of their current residence. Furthermore, why would unhappy spouses come to New York in particular for a divorce even if it had only a one-year rule, when they could go to any of the many states which had the same one-year requirement or even a shorter one?

The logic of plaintiff's argument is confirmed by the experience of the overwhelming majority of states which have durational residence requirements of one-year or less. In the recent past only five states have had divorce residence requirements longer than one-year. Massachusetts, Michigan, Nebraska, New York and Rhode Island. 50-State Compilation Issued by National Legal Aid

Association,
and Defender / Divorce, Annulment and Separation in the United States (1973), cited in Sosna, supra at 405 n. 15. Of these five states, the two-year requirements have already been ruled unconstitutional in two: Massachusetts [Fiorentino v. Fiorentino, 310 N.E. 2d 112 (Mass. 1974)] and Rhode Island [Larsen v. Gallogly, 361 F. Supp. 305 (D.R.I. 1973)]. See also Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971), in which a former two-year requirement in Wisconsin was also found unconstitutional. In a third state, Michigan, the two-year requirement has been reduced by amendment to 180 days. 1974 Michigan Legislative Service P.A. 345, amending M.C.L.A. §552.9. The only state other than New York which presently has a two-year requirement is Nebraska. To plaintiff's knowledge, the Nebraska statute has not been challenged in court. There was no suggestion in Sosna that the one-year rule involved there had not satisfactorily protected Iowa's interests and the widespread prevalence of requirements of one year or less suggests that these shorter durations have adequately protected other states from becoming divorce mills.

In practice, whether or not New York is an "easy divorce" state is more dependent on its substantive regulations than its residence requirement. New York grants divorces on six grounds, N.Y.D.R.L. §170, but remains one of the more conservative

jurisdictions. Of fifty-two jurisdictions in the United States forty-six have more liberal grounds, including forty-four which have no-fault divorces. Freed, Grounds for Divorce in American Jurisdictions (as of June 1, 1974), VIII Family Law Quarterly 401 (1974). If New York's two-year requirement were changed to a one-year rule, there would be no cause to fear that New York would become a divorce mill. As the Massachusetts Supreme Judicial Court stated in Fiorentino, supra, at 118,

> "In the first place it is highly unlikely, in view of our strict limitation on the substantive grounds for divorce, that this Commonwealth will be a very appealing jurisdiction for migratory divorce seekers even in the absence of a durational residence requirement. Thus, the possibility of a substantial incidence of fraudulent invocation of Massachusetts divorce jurisdiction depends on the purely speculative possibility that the Legislature will some day liberalize the substantive grounds for divorce."

New York's interest in protecting its divorce decrees from collateral attack would also be fully satisfied by a one year statute. In Sosna the Supreme Court reasoned that the one year statute legitimately protected Iowa decrees: "Since the majority of States require residence for at least a year . . . it is reasonable to assume that Iowa's one year 'floor' makes its decrees less susceptible to successful collateral attack in other States." Sosna v. Iowa, supra

at 408, n. 21. A similar rational basis is entirely lacking for New York's two-year rule. Only one other state requires a two-year waiting period, and the reasonable assumption would be that a one-year requirement would provide adequate protection from collateral attack in other states which themselves have that requirement or less.

As noted by Judge Dooling in dissent, 380 F. Supp. at 996-97, the peculiarity of New York's combination of none, one and two year durational residence requirements itself confirms that a one year requirement is "adequate to accomplish every legislative objective that duration of residence . . . might be supposed to seek to assure." If, for example, a couple had ever lived together in New York, no matter how briefly how long ago, a one-year statute would apply. N.Y.D.R.L. §230(2). If a one-year statute is adequate to protect New York's interests in the situation in this example and to protect the interests of the overwhelming majority of states in all situations, it is adequate to protect New York's interest in plaintiff's circumstances.

Since New York has no substantial interest in maintaining a two-year residence requirement for divorce instead of a one-year requirement, the two-year rule in N.Y.D.R.L. §230(5) is unconstitutional under any standard of the equal protection clause.

POINT III

THE DISTRICT COURT ERRED IN HOLDING THAT N.Y.D.R.L. §230(5) DOES NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

In Sosna, the Supreme Court upheld Iowa's one-year requirement under the due process as well as the equal protection clause. The Court distinguished its decision in Boddie v. Connecticut, supra, where it held that a state could not constitutionally deny access to courts to persons who could not afford to pay a fee, on the ground that Boddie involved total denial of access, while Ms. Sosna faced only a delay in access. Sosna v. Iowa, supra at 410. The Court did not say that any delay was automatically constitutional but stated that

> "the delay which attends the enforcement of the one-year durational residency requirement is, for the reasons previously stated, consistent with the provisions of the United States Constitution."

419 U.S. at 410.

Thus whether the New York two-year durational requirement violates due process is an open question after Sosna and should be generally governed by the same considerations discussed above in an equal protection context.

The issue of delay versus denial, raised by the Supreme Court in distinguishing Boddie and the Court's earlier durational residence

decisions, is inevitably a matter of degree. Any durational residence requirement involves a delay in obtaining benefits which will be provided after the residence period has expired. In Shapiro v. Thompson, supra, for example, the potential welfare recipient would be able to get welfare eventually. The temporary denial of assistance could have been characterized as a delay rather than a denial. On the other hand, delay also involves a permanent denial in some sense. In Shapiro the welfare recipient would never be able to recoup the assistance lost during the waiting period. Similarly in this case, plaintiff and members of her class are losing irrevocably the desired status of being single and thus able to remarry for a period of two years of their lives. This "inability to dissolve their marriages seriously impair[s] their freedom to pursue other [constitutionally] protected activities." United States v. Kras, 409 U.S. 434, 444-45 (1973).

Because delay and denial are not mutually exclusive, deciding the constitutionality of any durational residence requirement involves a weighing of individual and state interests. Since, as discussed in detail above, New York lacks any important interest in maintaining a two-year residence requirement as opposed to one-year requirement, N.Y.D.R.L. §230(5) violates plaintiff's due process right of access to a divorce court under Boddie as well as her rights to travel and to equal protection of the laws.

POINT IV

THE DISTRICT COURT ERRED IN REFUSING TO CERTIFY THIS ACTION AS A CLASS ACTION PURSUANT TO RULE 23

The district court refused to certify this case as a class action primarily on the ground that a class action was not necessary. The court reasoned that since the

> "important issue involved is one that threatens indefinitely to evade review since time dissolves particular applications of the statute inevitably, . . . [i]t can be safely said that the case will not be mooted by the lapse pendente lite of the two years of residence required by Domestic Relations Law §230, subd. 5. See Super Tire Engineering Co., 1974, 416 U. S. 115 . . . and cases cited."

380 F. Supp. at 996.

The district court's theory was rejected by the Supreme Court in Sosna. The Court specifically found that a divorce residency case was not one "capable of repetition yet evading review," 419 U. S. at 399-400, because it was extremely unlikely that the named plaintiff would ever again be affected personally by the challenged provision. The Court held that Ms. Sosna's case was not moot, even though it was moot as to her personally, because state officials would continue to enforce the statute against other persons, and because the case had

been certified as a class action. 419 U.S. at 399. Thus the very factor which the district court believed to justify denial of class status, the possibility of mootness, in fact requires it.

Neither is there any other reason to deny class certification in this case. The district court said that the class is "illimitable" and the class members have not that "concurrence in time and nature of interest which could bring them into the focus of this case..." On the contrary, the class to be certified in this case, consisting of all persons who are prevented from bringing divorce actions by the enforcement of the statute, is virtually identical to the class approved by the Supreme Court in Sosna. There the Court specifically found that the named plaintiff was able to "fairly and adequately protect the interests of the class" under Rule 23 (a) since "it is unlikely that segments of the class appellant represents would have interests conflicting with those she sought to advance" and "the interests of that class have been competently urged at each level of the proceeding." 419 U.S. at 403. The same is true in this case. This action presents exactly the kind of situation contempleted by Rule 23 (b) (2) in which government officials are enforcing a statute against a large number of persons "thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole..."

See also Sosna v. Iowna, 419 U.S. at 397, n.4. Similar classes have been recognized in innumerable cases. See, e.g. King v. Smith, supra; Dunn v. Blumstein, supra; Wymelenberg. v. Syman, supra.

In Sosna, the only question raised about the class is found in the Court's mention of the failure of the defendant state court judge to contest the propriety of "appellant's effort to represent a statewide class against a defendant who apparently sat in a single county or judicial district within the State." 419 U.S. at 398, n.5. Since the Iowa judge had not raised this issue, the Court did not pursue it. In this case, however, the problem does not exist because plaintiff asked certification of defendant classes consisting of the presiding justices and clerks of matrimonial parts in the Supreme Courts in the 62 counties of New York State.

Such defendant classes are proper under Rule 23 (a) which provides that members of a class may "be sued as representative parties on behalf of all..." Defendant classes have been found proper in a number of cases. United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969); Samuel v. University of Pittsburgh, 56 F.R.D. 435 (W.D. Pa. 1972); Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 285 F. Supp. 714 (N.D. Ill. 1968); Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973).

As in those cases, the basic requirements of Rule 23 (a) are met for the defendant classes. The defendant classes are so numerous that joinder is impracticable. There is a common question of law: the consitutionality of N.Y.D.R.L. §230 (5). The defenses of defendants are typical of those of the class. And the representative parties, represented by the Attorney General of the State of New York, will adequately protect the interests of the class.

Furthermore, the requirements of Rule 23(b)(2) are met in that the plaintiff class has acted on grounds generally applicable to the defendant classes, making appropriate final injunctive or declaratory relief against the class as a whole. See Samuel v. University of Pittsburg, supra.

The district court erred in refusing the certify this case as a class action for both a plaintiff class and defendant classes.

CONCLUSION

For all of the foregoing reasons, the order and judgment of the district court should be reversed and remanded to the district court with instructions to enter summary judgment for plaintiff and to certify the action as a class action with respect to both plaintiff and defendant classes.

Respectfully submitted,

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MEMORANDUM

INCORPORATING FINDINGS OF FACT AND ORDER FOR JUDGMENT

Before MULLIGAN, Circuit Judge, and DOOLING and PLATT, District Judges.

PER CURIAM.

Plaintiff's action seeks to draw in question the constitutional validity of New York Domestic Relations Law, § 230, subd. 5. Defendants are the Justice of the Supreme Court of the State of New York presiding at Special Term Part V, Kings County, the Chief Clerk of that Special Term, and the Attorney General of the State. Section 230 provides that an action for divorce may be maintained only when

> "Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action"

or where the parties were married in the state and at least one of them resided in the state for a year before the divorce action, or the parties resided in the state as husband and wife at some time and at least one party resided in the state for a year before suit, or the "cause" for the marital action occurred in the state and at least one party had resided in the state for at least a year before suit, or

> "The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action . . ."

The action is framed under 42 U.S.C. § 1983 (and jurisdiction is based on 28 U.S.C. § 1343) as an action to redress a deprivation under color of state law of a right, privilege or immunity secured to plaintiff by the Federal Constitution.

Plaintiff avers, and it is not denied, that she is and has been a resident and domiciliary of New York since April 1973, and that she intends to remain indefinitely in New York. Earlier she resided in Puerto Rico for ten years, and earlier than that, had lived in New York for ten years. She married Ernest Edgar Mendez in San Juan, Puerto Rico, on November 21, 1972, and they lived together in Puerto Rico as husband and wife until March 22, 1973. The marriage is childless. Plaintiff says that she wishes to sue her husband for divorce pursuant to Domestic Relations Law § 170, subd. 1 on the basis of her husband's cruel and inhuman treatment of her while they were living together in Puerto Rico. She and her husband were not married in New York, they have never lived together as husband and wife in New York, the cruelty and inhumanity which she asserts as a basis for her divorce action did not occur in New York and her husband is now and continues to be a resident of Puerto Rico. In consequence, if plaintiff wishes to sue for divorce in New York, as she does, she is barred from doing so by the provisions of Domestic Relations Law Sec. 230, subd. 5 until she has resided in New York for two full years preceding suit. Plaintiff avers that since March 22, 1973 she has been a full time employee of Grayarc Company in Brooklyn, that she has worked for that company continuously since the date of her first employment and that she is a registered voter in the State of New York.

She avers further that she is without substantial funds, and can not afford either to repair to Puerto Rico to commence an action for divorce or adequately to defend herself in a Court in Puerto Rico if she is there sued by her husband for a divorce.

The first question is whether the action presents a genuine case or controversy in which the issue put forward by the plaintiff can be resolved. The plaintiff's husband has not been joined as a defendant; it may be that he could not successfully be joined as a defendant in this Court. See Rule 4(e). The named defendants are joined on the basis that

they are directly and responsibly charged with the duty of enforcing the statute, if it is valid, as they are required to presume.

The second question, assuming that a case is presented which requires decision of the issue, is the validity of the statute: plaintiff challenges it as denying to her as a recent resident the due process extended to people who, irrelevantly to the questions involved, have resided here over two years, as interfering with her right to migrate or travel in violation of the 14th Amendment and of the Commerce Clause, and as violating the equal protection clause of the 14th Amendment in creating an irrationally delimited class with the result that plaintiff is discriminated against.

I

The hearing of the motion established that the practice in marital actions, including actions for divorce, is well settled in the New York Courts. While the substantive grounds on which a divorce may be obtained are established now in Section 170 of the Domestic Relations Law and are today separated from the provision of the law limiting the circumstances in which the action for a divorce "may be maintained," for historic reasons in large part, the "jurisdictional" aspect of divorce actions has been traditionally subject to judicial scrutiny whether the actions are contested or uncontested. The complaint in an action for divorce must distinctly allege jurisdictional matter, specifically the residential and other requirements of Section 230. Marital cases are subject to separate handling in the Courts and the Clerk of the Special Term established for such marital actions examines the complaint to see whether or not the residential allegations are present in it. If they are lacking, then the Clerk rejects the pleading for filing, and in substance advises counsel that the pleading is inadequate and will not be entertained. If the plaintiff has a particular point—such as the present constitutional point—which in his or her judgment excuses the making of the allegedly indispensable allegation, the complaint can, upon the plaintiff's insistence, be submitted to the Judge. The Judge then examines the pleading to determine whether or not it does satisfy the requirements of both Section 170 and Section 230 by alleging matter adequate to justify maintenance of the action. It would then be the responsibility of the Judge to determine whether the residential requirement was unconstitutional or was valid and would be enforced.

If the Clerk or the Court overlooked the point, it would again and automatically come up, even in an uncontested case, at the inquest which would follow defendant's default. At inquests a printed card is presented to counsel for his or her guidance in questioning the plaintiff and other witnesses, and among the questions contained on the printed card which must be asked, is the question concerning residence. In this setting, it is plaintiff's contention that the residence issue is directly and inevitably presented and ruled on, and invariably will end in requiring satisfaction of the residential term of the statute.

Plaintiff contends further that if a challenge to the constitutional validity of the statute were presented to Mr. Justice Heller or any other judge presiding in the Marital Part, the Attorney General of the State would immediately be notified, as required by Civil Practice Law and Rules § 1012(b), and, thereupon, the Attorney General, the statute provides,

> "shall be permitted to intervene in support of its constitutionality."

Executive Law, § 71 provides that where the Court in such a case has made an order authorizing the appearance of the Attorney General "it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute." Plaintiff's position, then, is that in joining the Clerk of the particular Special Term and the Justice presiding at it as well as the Attorney General she has brought before the Court those who are

charged with responsibility to give effect to the statute in any legal proceeding within its language and with the duty to defend the statute and its validity. Plaintiff argues that the absence of the husband as the party who would be bound by the adjudication is not decisive, because his interest, if he has a legally cognizable interest in the precise issue, will not be adjudicated, but only her right—as against the state—as a person not two years resident in the state to have access to its courts in an action for divorce. *Cf.* New England Mut. Life Ins. Co. v. Brandenburg, S.D. N.Y.1948, 8 F.R.D. 151, 154-155. And plaintiff points out that although in none of them was the point specifically discussed, the reported Federal cases dealing directly with durational residence requirements for marital actions were all suits against the Judges of the Marital Courts or against the Attorneys General, Governors or other officers of the State, and that the spouse of the plaintiff was not in any of these cases joined as a defendant. See Wymelenberg v. Syman, D.Wis.1971, 3[illegible] F.Supp. 1353 (suit against judge; attorney general and governor notified of pendency of suit); Shiffman v. Askew, M.D.Fla., 1973, 359 F.Supp. 1225 (suit against governor and attorney general); Mon Chi Heung Au v. Lum, D.Haw.1973, 360 F.Supp. 219 (judge and director of family court, responsible for routine procedural administration); Sosna v. Iowa, N.D.Iowa, 1973, 360 F.Supp. 1182 (suit against the state and the judge of the district court); Larsen v. Gallogly, D.R.I.1973, 361 F.Supp. 305 (parties uncertain but one defendant was the State Court Judge and against him damages were sought as well as a declaratory judgment respecting invalidity of the statute); McCay v. South Dakota, D.S.D.1973, 366 F.Supp. 1244 (parties in addition to the state uncertain but only the attorney general appeared and he appeared for all defendants).

[1-4] Boddie v. Connecticut, 1971, 401 U.S. 371, 374, 377, 380-381, 91 S.Ct. 780, 28 L.Ed.2d 113, may be taken for present purposes to put beyond dispute the principle that a person having a good faith claim or defense vindicable only through judicial determination may not be denied access to an appropriate judicial tribunal unless the bar to judicial relief can be constitutionally justified. *Boddie* also stands for the proposition that a litigant cannot be denied access to a court on the ground that another court is available if the availability of the other court imposes burdens that make the right to resort to it unreal or beyond the means of the prospective litigant. In general, it must be agreed, a judicial officer who renders an erroneous decision is not suable by the litigant against whom he has rendered the erroneous decision, even if the claim is sought to be supported by characterizations of malice, recklessness, etc. See Pierson v. Ray, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288. And, finally, it may be taken for granted that where a litigant has a specific right to have an action entertained in a particular court or to have some particular determination made in that court which is refused by a judicial officer, mandamus against the judicial officer is authorized and frequent, just as a mistaken assumption of judicial authority may be prohibited by writ directed to the judicial officer. These are familiar principles.

The special question here is rather the plainer one of whether a prospective litigant may resort to the Federal Courts for an advance determination of a jurisdictional issue, where the claim involved is one of constitutional dimension, by initiating an action against a state judicial officer to whom that issue would in a normal action be submitted for determination. Here it would fall to Mr. Justice Heller to decide the question tendered in this Court were plaintiff immediately to proceed to the filing of an action for divorce without alleging two years residency on her own part or that of her husband.

[5] Normally issues, and particularly issues of constitutional dimensions, are not determined except where they are necessarily drawn in question by litigation over real and present disputes in which the interest of each party requires that it seek a determination of the issue in an opposite sense of that sought by the other party. Hence, entertainment of plaintiff's suit here requires the conclusion that there is a genuine controversy between the plaintiff and one or more of the defendants in which they have an interest adverse to hers in the determination of the question. But Mr. Justice Heller has no such interest: if, as plaintiff contends, the statute is unconstitutional, then Mr. Justice Heller's sole interest is in so determining, and in denying effect of the statute. He is not an adversary of the plaintiff, but a judicial officer bound to decide the issue according to the law as he finds it. His decision cannot be foretold, but the assumptions of plaintiff's case would require the prediction that he would invalidate the statute just as the assumptions of the Attorney General's argument in this Court requires the prediction that he would hold the statute valid. In any case, his posture would be that of an entirely disinterested judicial officer and not in any sense the posture of an adversary to the contentions made on either side of the case. He would start by presuming that the statute is valid, as must this Court, but his unconditional responsibility would be to determine the issue in the light of constitutional considerations no less than considerations of interpretation. Similarly, the Clerk of the Marital Part has no adversary interest; if the complaint is one that the Court, State or Federal, advises him is properly to be entertained and filed, it is his duty to file it, and there is, in addition, a duty on his part to file any complaint which tenders a non-frivolous question of jurisdiction requiring judicial resolution.

The question, then, is whether the Attorney General may not have a very different responsibility and, of course, he has. His private judgment is quite beside the point; he must defend the statute whether he thinks it valid or invalid, for that is his official responsibility owed to the People of the State and the legislature through which they enacted the law. The responsibility of the Attorney General indeed assures that, if the case can genuinely be maintained, there will be adequate adversary representation of the position that one can suppose the absent husband might wish to take. But it would seem that the Attorney General would insist that he not be called on to put the statute at risk except where its validity was necessarily drawn in question in a litigation between adverse parties the disposition of whose rights inescapably required passing on the validity of the statute.

[6, 7] Golden v. Zwickler, 1969, 394 U.S. 103, 110, 89 S.Ct. 956, 22 L.Ed.2d 113, is a recent reiteration of the general principle that no Federal Court has jurisdiction to pronounce any statute void because irreconcilable with the Constitution except as it is called upon to adjudge the legal rights of litigants in actual controversies. As the Court put it in North Carolina v. Rice, 1971, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413

> "Early in its history, this Court held that it had no power to issue advisory opinions . . . and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."

The Court in Liverpool, etc., S.S. Co. v. Commissioners, 1885, 113 U.S. 33, 38–39, 5 S.Ct. 352, 355, 28 L.Ed. 899 after saying that it had no jurisdiction to pronounce a statute void because irreconcilable with the Constitution except as called upon to adjudge the legal rights of litigants in actual controversy continued by saying:

> "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law

in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

Muskrat v. United States, 1911, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 is illustrative. There, the Congress had passed a law professing to confer on the United States Court of Claims and on the Supreme Court of the United States power to determine the constitutional validity of laws passed in 1904 and 1906 empowering the Secretary of the Interior to grant rights of way for pipe lines over Indian lands and extending for 25 years the time in which certain Indians of specified tribes were forbidden to alienate tribal lands. Plaintiffs in the action were Indians whose interests in their Indian land allotments might conceivably be affected by the restriction of rights or by grants of interests under the challenged statutes. The Supreme Court held that the statute could not confer jurisdiction of litigation to determine the validity of the statutes except in an actual case or controversy. Referring to the constitutional creation of the federal judicial power, the Court said (219 U.S. at 361, 31 S.Ct. at 255)

"That judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and the law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question."

While a case or controversy to be justiciable need not be one in which immediate specific relief is demanded and appropriate, Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241, 57 S.Ct. 461, 464, 81 L.Ed. 617, makes clear that a justiciable controversy must be one that is not hypothetical or abstract, or academic or moot:

"The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case admitting of an immediate and definitive determina-

tion of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."

Cases arise in which public officers, who would normally not be adversary parties to private litigants, do become adverse because their official acts damagingly transgress the rights of a litigant. *Boddie* is typical: the Clerk's refusal to file the plaintiffs' papers solely because they had not paid the filing fee, and the action of the judges charged with the administration of the Court in similarly declining to grant the applications to file the papers, were completed ministerial acts that as such and of themselves denied the very right which the Federal case properly vindicated in the action under 42 U.S.C. § 1983. The contest was between the litigants and the Clerk *qua* Clerk (and the administrative judges) seeking to exact a fee and barring access to the Court until it was paid. He (representing the State) was the adversary in the fee controversy that was barring the litigants. The action of the state officers was a completed denial by state action (*i. e.*, the refusal to file because the fee "due" the Clerk had not been paid) of a constitutional right, a denial of the Ex parte Young, 1907, 209 U.S. 123, 156, 161, 28 S.Ct. 441, 52 L.Ed. 714, type, and not a simply erroneous judicial decision on a constitutional point, reviewable only by appeal. Judge Smith in *Boddie* in the District Court, 286 F.Supp. 968, 971, pointed this out—that the defendants were there sued for their obstructive action, taken in their administrative capacities, action quite different from the judicial function exercised in an unreported state case decided by another judge who had, after full consideration on the merits, denied an application to proceed *in forma pauperis* in a divorce action. Similarly, where the extraordinary relief of mandamus or prohibition is granted as against a judicial officer who has either refused to exercise a jurisdiction or a discretion which it is his duty to exercise or who has insisted upon exercising a jurisdiction that is not his: the judicial officer has made himself an adversary by the course that he has pursued in denying a clear-cut right. Almost universally in such cases the extraordinary writ supplements the procedural law and but furnishes a mode of intermediate appeal from a damagingly mistaken determination that cannot be adequately remedied by appeal at the end of the whole case. Similar is such a case as Law Students, etc., Council v. Wadmond, 1971, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749, in which the adversary of the law-student applicants for admission to practice was, inevitably, a committee of the Appellate Division in any dispute over the right to be admitted to the Bar. Only the Court through its committee and by its confirmatory actions could grant or withhold the right to practice, subject to judicial review. The immediate act of granting or denying the right to practice law, as deliberative action taken on the application, was a completed act of government which, if it deprived a student applicant of a constitutional right, was vindicable by federal action under 42 U.S.C. § 1983 or by appeal through the New York Courts and, ultimately, to the United States Supreme Court. This is sharply brought out in Tang v. Appellate Division, 2d Cir. 1973, 487 F.2d 138. There *Tang* was denied admission by the Committee on the ground that he was a temporary and not permanent resident of the State. He petitioned the Appellate Division for an order admitting him and the Court denied his application. Then Tang sued in the federal court, which dismissed his complaint. The Court of Appeals held that Tang had voluntarily chosen to initiate judicial review of the denial of his application in the State Court and had obtained a determination, although it was adverse. The Court pointed out that Tang could choose between suit under 42 U.S.C. § 1983 to redress the allegedly wrongful denial or procedure through the state courts, and, having chosen state judicial procedure,

could not review the first adverse judicial determination, that of the Appellate Division, by an appeal to the federal district court. Again the case brings out the distinction between the public body as an adversary committing the act of right-denial and the tribunal that errs in performing a judicial function.

[8] The critical difficulty in the present case is that it is neither denied or deniable that any action that Mr. Justice Helier or any of his colleagues could take on plaintiff's complaint for divorce if presented to him would necessarily be a judicial determination of the issue presented here and it could not under New York procedures be a merely ministerial or administrative act. Hence the essential quality of adverseness is intrinsically absent.

Finally, plaintiff suggests that to reject jurisdiction here, particularly on the ground on which the denial is placed, altogether denies her the right to vindicate her federal constitutional right in the first instance in a federal court and remits her to the state court. That, she points out, is necessarily the effect of the powerful probability that a federal district court would feel compelled to follow Phillips, Nizer et al., v. Rosenstiel, 2d Cir. 1973, 490 F.2d 509, 512–514, if she sought to sue for divorce in this court. Plaintiff suggests that the result is the same as indulging that general deference to the alternative of state court proceedings condemned in Zwickler v. Koota, 1967, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed.2d 444, in Steffel v. Thompson, 1974, 415 U.S. 452, 461, 465–468, 94 S.Ct. 1209, 1217, 1219–1220, 39 L.Ed.2d 505, and in Salem Inn, Inc. v. Frank, 2d Cir. June 25, 1974, 501 F.2d 18, 22. The consequence is as plaintiff asserts, but it arises from the adventitious circumstance that the cause of action which she wishes to sue on is one that cannot be entertained in this Court. Want of federal jurisdiction of the class of actions involved prevents this Court at this time and in this form of action from dealing with the jurisdictional issue that the divorce case will present to the court in which it is properly filed if that court is required to apply the law of New York.

But for the circumstance that so many other federal district courts, including three-judge federal district courts, have entertained actions of precisely the shape of the present action, it would be proper and sufficient to stop here. The *sub silentio* holdings of the other federal cases make it more appropriate that the present ground of denying relief be considered a coordinate and not the sole ground of decision here.

II

Plaintiff's good faith residence in New York is not challenged. She is employed here, means to reside here indefinitely, and has already resided in the State for over one year. Her argument for the unconstitutionality of the statutory requirement that one party to the marriage be shown at the time the action is commenced to have resided in New York for the two years preceding suit starts with the obvious fact that the statute classifies persons by the length of their residence here, and, in consequence, may be thought "suspect" under the equal protection clause absent showing that the abridgement of right worked by the classification serves a legitimate legislative objective which outweighs the loss of right flowing from the classification. She argues that the requirement deters migration into the State without reference to the purpose of migration by penalizing the migrant after her settlement here without serving any significant interest of the state. Denial of due process by the statute, it is argued, is evident in denial to her for two years of a right to an adjudication of her marital status at her own domicile despite the existence of a constitutionally exercisable jurisdiction.

That the right of access to the Courts is one that is constitutionally protected, she argues, Boddie v. Connecticut, *supra*, makes very clear. *Cf.* United States v. Kras, 409 U.S. 434, 444–445, 93 S.Ct.

631, 34 L.Ed.2d 626. She argues, and for present purposes the argument may be accepted as valid, that to deny her access to the state court at this time is to deny her an opportunity at a meaningful time and in a meaningful manner to seek the justice that she needs in view of her poverty and the necessity of resorting to a distant court to obtain relief it it is not available to her in New York. Turning to asserted legislative interests in imposing a residential requirement, plaintiff argues that the obvious need to establish a valid jurisdictional basis for marital actions is amply satisfied by a requirement of domicile without reference to duration of domicile, and that to require domicile of a specific duration, especially one so long as two years, is to reject reasonable alternative means of protecting the courts against imposition in favor of adopting an arbitrary and, in effect, conclusive presumption against domicile until two years have passed. Vlandis v. Kline, 1973, 412 U.S. 441, 446, 93 S.Ct. 2230, 37 L.Ed.2d 63, is only the most recent case rejecting conclusive presumptions that residence has not been acquired because duration of residence has not exceeded a statutory term. See Carrington v. Rash, 1965, 380 U.S. 89, 96, 85 S. Ct. 775, 13 L.Ed.2d 675. Plaintiff argues that neither the promotion of marital reconciliation nor economy in the administration of the Courts of this State presents a significant reason for the legislation since no parallel restrictions are imposed on residents having the same interest in reconciliation and in unburdening the courts of their causes. And plaintiff relies heavily on the number of cases that have—in the wake of the Supreme Court's durational residence adjudications in other fields of the law—invalidated durational residential requirements in marital cases. The cases are, concededly, divided, however.

The Attorney General presents the matter in a very different light which emphasizes the special nature of the marriage relationship, the special nature of judicial divorce, and the role that residence and length of residence plays in the complex jurisdictional problems created by marital actions in cases in which only one of the parties to the action resides in New York and the marriage itself has had no New York contact. It is pointed out that if the "cause" of the divorce action occurred in the state and both parties resided in the state when the divorce action was commenced the Court would have jurisdiction without reference to duration of residence. In view of the grounds or "causes" of divorce defined in Section 170 of the Domestic Relations Law, Section 230, subd. 4 has a significant sphere of operation, and it emphasizes that the New York statute is not essentially oriented to length of residence for its own sake but because of its relation to "causes" of divorce and problems of jurisdiction. Other subdivisions of Section 230 do indeed require that one party to the proceeding have resided within the state for a year preceding action, but in each instance the concern with jurisdictional considerations is manifested in the requirement that there be present a second jurisdictional factor, that is, that the parties had been married in the state, or had once resided together in the state as husband and wife, or that the "cause" occurred in the state. It is only where no second factor is present that, in subdivision 5 of Section 230, the longer residence period is introduced into the statute.

The Attorney General points out further that the establishment of grounds for divorce and the provision of judicial actions for divorce are both wholly creatures of statute. See Wait v. Wait, 1850, 4 N.Y. 95, 100. Thus, before the drastic changes in New York divorce law the sole ground for dissolving an otherwise valid marriage was the defendant's adultery. In order to maintain an action for divorce on the ground of one party's adultery it had to be shown either that both parties resided in the state when the offense was commit-

ted (without reference to where they resided when the action was commenced), or that the parties had been married in the state, or that the plaintiff resided in New York when the offense was committed and still resided in New York when the action was commenced, or that the offense was committed in the state and the injured party resided in the state when the action was commenced. Hence, it is argued, until the change in the divorce law the plaintiff would have had no opportunity to sue in New York at all. And, as under the present statute, three factors, that is, a marital residence in the state, solemnization of the marriage in the state, and occurrence of the offense in the state, were all given jurisdictional significance; no duration of residence, however, was required. In a word, New York has not historically based its exercises of jurisdiction on duration of residence but on the fact of residence among other jurisdictional facts. Duration of residence under the present statute is, similarly, not calculated to screen out non-residents or discourage access. It establishes, rather, the substantiality of the state's interest in the party whose residence (or domicile) in the state under Section 230 authorizes it to exercise jurisdiction over the marital status or contributes to that authorization.

[9] The Attorney General agrees, of course, that Williams v. North Carolina, 1942, 317 U.S. 287, 297–299, 63 S.Ct. 207, 87 L.Ed. 279, makes it clear that each state has such a concern in the marital status of persons domiciled in the state that it can alter the marital status of the spouse domiciled within it even though the other spouse is absent. That, however, does not signify that the state must exert every jurisdictional authority that it might exercise if it went to the limit of its powers. It is not unreasonable, where the sole basis for its jurisdiction is a recently acquired domicile, to show a measure of deference to the interest of the absent spouse, and to the interest of the state from which its new domiciliary has so recently removed, and to make provision for the integrity of its decrees when called into question in other courts. *Cf.* Shiffman v. Askew, *supra*, 359 F.Supp. at 1231–1232. The New York statute must function in a system in which comparable statutes of other states, including the state from which its new domiciliary has removed, may authorize adjudication of the same marital status. It is not unreasonable for New York to take into account, particularly since so many marital actions against non-resident defendants are undefended actions which must essentially be decided *ex parte*, that the risk of fraudulent imposition on the courts and on absent defendants is substantial and can be very materially diminished by imposing a requirement that plaintiff show that one of the parties has resided in New York for two years preceding suit.

[10, 11] To put it another way, New York has granted the right to divorce and afforded a forum on a perfectly reasonable pattern. It cannot fairly be argued that such a statute inhibits migration into the state or imposes an irrational constraint upon the new domiciliary's appeal to the court for relief in respect to his or her marital condition. That the state might have gone further and provided other bases of jurisdiction does not mean that it has violated the constitutional rights of potential suitors in not doing so. The jurisdictional requirements form part of a coherent whole, particularly when read with Domestic Relations Law, § 170 and the nature of the grounds of divorce there created. The statutory scheme neither implicates any invidious discrimination against recent domiciliaries nor manifests a will to inhibit migration into this state, but only a concern with establishing adequate jurisdictional bases for adjusting marital relations in the light of the coexisting powers of other states to affect the same relationships in the interest of the spouse domiciled in such other states. It is to be borne in mind

that legislative enactments do not have to justify themselves, they do not have to be supported by proofs. They are self-justifying because legitimately enacted until it is demonstrated that they work some unconstitutional deprivation of right. There is no such showing here.

III

[12] The case has been pleaded as a class action, but the obstacles to treating it as such are insuperable. In a sense the "class" or "classes" are illimitable, and the class members have not that concurrence in time and nature of interest which could bring them into the focus of this case, or of any other individual case. Rather, this is, if properly a case, a classic test case dealing with a matter certain of recurrence and with a statute uninterrupted in its operation. The important issue involved is one that threatens indefinitely to evade review since time dissolves particular applications of the statute inevitably, and it is the very statutory insistence on the onerous and right-defeating lapse of time that is challenged. It can safely be said that the case will not be mooted by the lapse *pendente lite* of the two years of residence required by Domestic Relations Law § 230, subd. 5. See Super Tire Engineering Co. v. McCorkle, 1974, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1, and cases cited.

It is

Ordered that plaintiff's motion for summary judgment is denied and that defendants are entitled to summary judgment and that the Clerk enter judgment that plaintiff take nothing and that the action is dismissed.

DOOLING, District Judge (dissenting in part).

The state has by statute created grounds of divorce and established judicial jurisdiction over divorce actions. Having done so, it may not establish an arbitrary pattern for the exercise of divorce jurisdiction. The variations in the jurisdictional pattern must be reasonably related to attaining the legislative objectives, that is establishing substantive grounds for divorce, and regulating the assumptions of judicial jurisdiction so as to assure the validity, efficacy and convenience of the exercises of jurisdiction. Under New York law as it existed before the major revision of the divorce law in 1966 residence was a jurisdictional factor but duration of residence was not a jurisdictional factor in divorce actions although it was (under former Domestic Relations Law § 230, subd. 3) in annulment and separation actions. See, e. g., Law of 1962, Chapter 313, §§ 7, 10. If residence is, indeed, jurisdictionally relevant in marital actions, as, historically, it has been considered, it has been the fact of residence and not its duration that has been considered relevant. The present statute establishes as jurisdictionally relevant factors in all marital cases (i) marriage in the state, (ii) the occurrence of the cause of the action in the state, (iii) marital residence (however brief) at any time in the state, and (iv) residence in the state (however brief) by both parties at the time of suit; in addition, one year of residence in the state before suit by one of the parties was made a jurisdictional factor in 1966. Two jurisdictional factors are required to concur to establish jurisdiction, except by subdivision 5 where the two year residence requirement seems to take the place of the absence of a second jurisdictional factor. The tabular symmetry that emerges does not justify or rationalize the jurisdictional pattern or the place in it of duration (as distinguished from the fact) of residence. Rather, the prominence of the one year duration of residence factor in the statute appears logically to demonstrate that such a provision was adequate to accomplish every legislative objective that *duration* of residence (as distinguished from the fact of residence) might be supposed to seek

to assure. Substantially for the reasons set forth by Judge Pettine in Larsen v. Gallogly, D.R.I.1973, 361 F.Supp. 305, the statute should be found unconstitutional.

TELECOMMUNICATIONS, ENGINEERING SALES & SERVICE COMPANY, INC.

v.

SOUTHERN TELEPHONE SUPPLY COMPANY and John M. Smith.

Civ. No. 3-74-17.

United States District Court, E. D. Tennessee, N. D.

June 6, 1974.

Former employer brought action against employee and employee's new employer for breach of employee's covenant not to compete and for inducement to breach contract. The District Court, Robert L. Taylor, J., held that employee had breached the contract; that noncompetition covenant was reasonable; that new employer had not induced employee to breach the contract; that new employer had continued to employ employee after being informed that such continued employment was in violation of the covenant not to compete; that former employer was entitled to injunctive relief against employee; and that former employer was entitled to $20,000 damages from new employer.

Order accordingly.

1. Contracts ⇐95(1)

Fact that contract of employment offered to persons currently employed by employer may have been offered on a "take it or leave it" basis was not determinative of whether employer used coercive tactics to force the contract, which contained a noncompetition covenant, upon its employees.

2. Contracts ⇐312(4)

Fact that both employee's former employer and his present employer represent the same or similar manufacturers did not per se establish that the sales items were competitive and that employee's change of jobs was thus in violation of noncompetition covenant contained in employment contract with former employer.

3. Contracts ⇐141(3)

Evidence demonstrated that employment contract, which contained noncompetition covenant, was valid, supported by adequate consideration, and executed without duress or coercion on the part of the employer.

4. Master and Servant ⇐63

Employee who, on November 5, gave notice of resignation to be effective no later than the end of November and who took position with different employer on December 1 violated contract which called for 45 days' written notice before termination.

5. Contracts ⇐117(2)

Under Tennessee law, covenant restraining future competition is valid if it is reasonable as to time and space.

6. Contracts ⇐117(2)

Under Tennessee law, in determining whether noncompetition covenant is reasonable as to time and space, court may consider such factors as threatened danger to the employer in the contract's absence, the economic hardship imposed upon the employee, the public interest, and the consideration supporting the agreement.

7. Contracts ⇐116(1)

Basic policy underlying enforcement of noncompetition covenants in contracts of employment is to protect the confidentiality of the employer-employee rela-

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

John C. Gray Jr. being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 159 Bergen St. Brooklyn, N.Y.

That on the 8th day of August, 1975, deponent served the within brief for plaintiff appellant on each addressee listed below, being the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within New York State, addressed to:

Louis J Lefkowitz.
Attorney General
2 World Trade Center
New York, N.Y.

John C Gray Jr

Sworn to before me this
8th day of aug., 1975

Margaret Zeigler
NOTARY PUBLIC

MARGARET ZEIGLER
Notary Public, State of New York
No. 24-4382895
Qualified in Kings County
Commission Expires March 30, 1977